Supreme Court, U.S.
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No.

In the

Supreme Court of the United States
October Term, 2005

MICHAEL SPANO, SR., EMIL SCHULLO, AND JAMES INENDINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' Title 18, Section 666 convictions were unconstitutional as applied, where the prosecutions, which were based on the alleged bribe of a local police chief to obtain a contract to investigate whether local police were in compliance with a local residency ordinance, were unrelated to any federal interest in a national program or project, thus upsetting the proper balance between the prosecutorial power of the State and federal governments as protected by the Tenth Amendment and Separation of Powers embodied in Article I of the Constitution.

2. Whether the decision of the Seventh Circuit Court of Appeals in this case, holding that the opinion in *Sabri v. United States*, 541 U.S. 600 (2004), foreclosed an as-applied constitutional inquiry in Title 18 U.S.C. § 666 cases is in conflict with the decision of this Court in *Sabri* and *Fischer v. United States*, 529 U.S. 667 (2000), and those of other circuit courts of appeal.

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Petitioners Michael Spano, Sr., Emil Schullo, and James Inendino ("Petitioners") respectfully petition that this Honorable Court grant its writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinions affirming the district court's judgment of conviction and remanding for a limited consideration of Petitioners' sentences is reported at *United States v. Spano, et al.*, 401 F.3d 837 (7th Cir. 2005) ("*Spano I*"). (App. 5-14.) The Seventh Circuit's opinion affirming Petitioners' sentences after a limited remand is reported at *United States v. Spano, et al.*, 447 F.3d 517 (7th Cir. 2006) ("*Spano II*"). (App. 1-4.)

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals in *Spano II* was entered on May 9, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 1:

> The Congress shall have Power . . . to provide for the . . . general Welfare of the United States . . .

U.S. CONST. art. I, § 8, cl. 18:

> Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. amend. X:

> **Reserved powers to states.**
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The Town of Cicero ("Cicero") had an ordinance requiring its employees to live within the town's boundaries. Cicero's firefighters were also required to reside within the town as part of their collective bargaining agreement. To explore the fairness of the residency requirement, their union hired an investigator, who reported back that three Cicero police officers, as well as the town's president, were living outside town limits, also in violation of the ordinance. In the fall of 1995, the firefighters filed a formal labor grievance, complaining that the residency requirement was being enforced against them but not as to police officers living outside of the town limits, and the firefighters claimed that they too should be allowed to live outside of Cicero.

During this period, Petitioner Emil Schullo was serving Cicero as the Director of Public Safety. He was responsible for oversight of the town's police, fire, and health departments. The union brought its complaint and grievance to

Schullo's attention. The union gave the names and addresses of the three police officers suspected of residing outside of Cicero to one of the town's attorneys, who, in turn, provided the information to Schullo. Schullo then hired an investigator to determine the residency of the three police officers.

A co-defendant at trial, Peter Volpe, was a Berwyn police officer who operated Hargraves Security Services with Petitioner Michael Spano, Sr. Schullo asked Volpe whether he was interested in conducting the investigation. Volpe turned the offer down because he did not want to investigate fellow police officers. Instead, Volpe suggested that Schullo hire Sam Rovetuso, who had his own detective agency, to do the work. Petitioner James Inendino had earlier introduced Rovetuso to Spano and Volpe. Volpe advised Rovetuso about the work that needed to be done, and told him to contact Schullo.

Unbeknownst to the Petitioners, Rovetuso was working as a confidential informant under the direction of an Internal Revenue Service agent, and was paid thousands of dollars in cash for his services. Rovetuso, a three-time convicted felon, had agreed to work undercover, wear a wire, and record conversations with the Petitioners. The federal investigation began in August 1995, and ended in April 1998.

On November 14, 1995, even though he knew he had the contract, Rovetuso, with the knowledge of the federal agents, first brought up the idea of bribing Schullo. Rovetuso asked Volpe, "Do we need to send anything to [Schullo]?" Volpe rejected the suggestion and said, "Uh, no, just do what you gotta do. Do the work." Rovetuso met Schullo on three occasions in November 1995. During the first meeting, Schullo described the nature of the investigation to be performed. At the second meeting, Schullo provided Rovetuso with the names and addresses of the

officers to be investigated. Rovetuso employed investigators to conduct the residency investigation. Following initial surveillance of the police officers, Rovetuso prepared the first invoice for services rendered, and hand-delivered it to Schullo during their third and last meeting on November 28, 1995. Schullo called the Cicero town attorney during the meeting, and inquired about what evidence was needed to prove the officers were living outside of town. Later, while reviewing the invoice, Rovetuso remarked to Schullo, amidst other comments, that one figure represented Schullo's "end." Schullo responded "okay" to the series of comments, and said that the figure was for administrative and equipment costs.

Later, Volpe hand-delivered a Town of Cicero check to Rovetuso, and they discussed the distribution of the money among them. Rovetuso negotiated the check at the Taylor-Ogden Currency Exchange, where Inendino was employed. Rovetuso paid Inendino directly in cash, and delivered additional cash to Volpe for Volpe, Spano, and Schullo. While meeting with Rovetuso, Inendino cautioned Rovetuso about his remark to Schullo (his "end").

According to Volpe, Spano told him that 10% was to be added to Rovetuso's invoices, and that the 10% was going to Schullo. A total of six invoices were prepared by Rovetuso and were submitted to the town for payment. Following the hand-delivery of the first invoice to Schullo, the five subsequent invoices were hand-delivered by Rovetuso, or one of his associates to Volpe. Rovetuso also reviewed his breakdown sheets of the distributions with Volpe and, on occasion, with Inendino. Volpe, in turn, delivered the invoices to Spano, who then delivered them to Schullo. Volpe received the Cicero checks from Spano, and delivered them to Rovetuso. The cash proceeds were then distributed in the same manner as the first distribution.

The residency investigation began in November 1995, and concluded in January 1996. Over the course of the investigation, the investigators' fees were increased from $40 to $50 to $55 per hour per Spano's directions. Private investigator John Rea, who had been a federal agent, testified that his hourly rate for such an investigation during 1995 and 1996 was at least $75 per hour. The six checks issued from the town totaled $75,831.24. Rovetuso's employees received $23,893.50 for their legitimate labor services, and $10,563.40 was spent on actual expenses. In order to cover Rovetuso's future taxes, he received $10,620 from the distributions. A figure of $11,782.84 allegedly was delivered by Spano to Schullo. Spano and Volpe split $12,647.66, while Rovetuso and Inendino split $6,323.84.

Rovetuso prepared an interim report and a final report of his investigation, which consisted of two volumes of reports and two exhibit books. Two of the police officers who were subjects of the residency investigation subsequently were either terminated or were forced to resign for residency violations. In March 1996, the town's Board of Trustees passed an ordinance providing for the submission of a proposition to the voters on the town's residency requirement. In November 1996, the majority vote favored the residency requirement.

With respect to the issue of the as-applied constitutionality of the 18 U.S.C. § 666 charges, the indictment made no reference to any particular federal program. It was the government's theory that as long as Cicero received $10,000 in federal funds, the Petitioners' conduct in allegedly bribing Schullo need not be involved with or connected to a federal interest in a federal program.

No Cicero police officers conducted the investigation, no Cicero police officers were utilized at all. In addition, if a town employee who was subject to the residency requirement was found to have lived outside the town's limits, the

sanction involved dismissal from employment, not any form of police or local criminal prosecution.

The court below ruled that the prosecution of Petitioners was not unconstitutional as applied. *United States v. Spano*, App. 10 - 11.

REASONS FOR GRANTING THE WRIT

1. *Petitioners' convictions under 18 U.S.C. § 666 were unconstitutional as applied, having been based on an alleged bribery scheme to obtain a contract to investigate compliance by police with a town residency requirement , which scheme was unrelated to any federal interest in a national program and thus the convictions upset the balance protected by the Tenth Amendment between the prosecutorial powers of the state and federal governments.*

This case raises recurring, profound questions concerning the proper relationship between the states and the national government with the increasing federalization by Congress of "local crime." Late Chief Justice Rehnquist recognized and was critical of the trend in his public statements. *Chief Justice Rehnquist Criticizes Trend Toward Federalization of Crime*, 66 U.S. L.W. 2722 (May 26, 1998). In *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004), this Court held that Title 18 U.S.C. § 666 was facially constitutional, and that Congress had the power to enact it under the Necessary and Proper Clause and its spending power. However, although a statute is facially constitutional, a challenge may still be made that a particular prosecution is not constitutional as applied. *See United States v. Bass*, 404 U.S. 336 (1971); *Printz v. United States*, 521 U.S. 898 (1997).

The defendant in *Sabri* filed a pretrial motion to dismiss the indictment, claiming that § 666 was facially unconstitutional and therefore no claim was made that the defendant's conduct revealed that the prosecution was unconstitutional as applied. However, the Court in *Sabri* noted that ". . . it would have been obvious that the acts charged against Sabri himself were well within the *limits* of legitimate constitutional concern." *Sabri* at 609. Sabri, a real estate developer of a hotel and retail structures, offered three separate bribes to a city councilman in Minneapolis. This councilman was a member of the Minneapolis Community Development Agency that administered about $29 million in federal funds paid to Minneapolis.

The Court in *Sabri* discouraged facial challenges to statutes on the basis of over-breadth, but in no way indicated that as-applied constitutional challenges based on the facts of a particular case were to be foreclosed.

In *Salinas v. United States*, 522 U.S. 52 (1997), this Court, *sua sponte*, raised the need to test on a case-by-case basis whether a federal prosecution under § 666 was a legitimate exercise of federal power or an illegitimate intrusion into the powers reserved to the states. The Court avoided this problem by finding the bribe was related to the federal program, and the preferential treatment provided the briber was:

> *a threat to the integrity and proper operation of the federal program. Whatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds*; . . . We simply decide that, as a *matter of statutory construction*, § 666(a)(1)(B) does not require the Government to prove the bribe in question had an influence on federal funds and that, under *this*

> *construction, the statute is constitutional as applied in this case.*

522 U.S. 52 at 61 (emphasis added). In *Salinas*, the director of a state prison funded by the federal government to house federal prisoners was bribed to allow a federal prisoner to have unauthorized conjugal visits. Clearly this conduct threatened the integrity of the federal program. *Salinas*, then, was the first recognition by the this Court that a particular § 666 prosecution could extend federal power beyond its proper bounds when the offense conduct did not involve a threat to the integrity of a federal program.

Here, unlike in *Salinas*, neither the alleged bribers nor the Cicero residency investigation were in any way connected to any federal program. The alleged bribers here were not seeking one of the new police positions created by the federally funded COPS program (for hiring additional police), nor trying to influence a decision on anyone's application under that program. If Schullo had accepted a bribe to hire as a new police officer under the COPS program a person recommended by the other defendants the integrity of the COPS program might have been threatened. *See United States v. Frega*, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996) (the court hypothesized that some conduct by state judges might produce the requisite federal connection, "such as if a state court system received federal funds for the purpose of appointing counsel in death penalty *habeas* proceedings, and a state court judge accepted a bribe in exchange for appointing a particular attorney as *habeas* counsel"). Yet, of course, that was not the case here. Schullo's conduct in no way threatened any federal funding or program.

After this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) , the next step in the Court's evolving jurisprudence of protection of the proper federal-state

balance in regard to prosecutions under 18 U.S.C. § 666 was this Court's decision in *Fischer v. United States*, 529 U.S. 667 (2000). In *Fischer*, the facial constitutionality of § 666 was not at issue. *Fischer* involved theft from the Medicare program, and there was no question but that the defendants' conduct threatened the integrity of that federal program. *Fischer* was a case of statutory interpretation in which the Court determined that a hospital that received Medicare payments from its Medicare patients was an "organization" receiving "benefits" within the meaning of § 666(b). However, both the majority and the dissent recognized that certain prosecutions under § 666 could unconstitutionally extend federal power beyond its proper bounds. The Court there recognized that:

> Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. *Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.* To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation and purpose. The inquiry should examine the conditions under which the organization receives the federal payments . . . *The Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetrated upon Medicare providers. Fraudulent acts threaten the integrity of the program's integrity.* They raise the risk participating organizations will lack the level and quality envisioned by the program.

Id. at 681-82 (emphasis added). In *Fischer* the Court confirmed that § 666 prosecutions had to be limited to

those cases in which the offense conduct threatened the integrity of a federal program.

Justice Thomas, joined in dissent in *Fischer* by Justice Scalia, voiced even greater constitutional concerns involving the expanding use of § 666 to prosecute local crimes:

> *We have held that the spending power requires, at least, the exercise of federal power to be related to the federal interest in particular national project or programs.* If Congress attempted to criminalize acts of theft or bribery based solely on the fact that, *in circumstances unrelated to theft or bribery*, the victim organization received federal funds as payment for a market transaction, *this constitutional requirement would not be satisfied. Without a jurisdictional provision that would ensure that in each case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would upset the proper balance.*

Id. at 689 (emphasis added) (*citing South Dakota v. Dole*, 483 U.S. 203, 207 (1987), and *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see also* G. Healy, *There Goes the Neighborhood – the Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, 440 POLICY & ANALYSIS (CATO Institute) (05/28/02), pp. 4-5. Thus, Justices Thomas and Scalia indicated in *Fischer* that courts should, on a case-by-case or "as-applied" basis, determine whether a prosecution for bribery or theft under § 666 is sufficiently related to the protection of a federal interest in a federal program.

The indictment here did not charge that the Petitioners' conduct threatened or even affected any federal program. The government did present evidence that Cicero received monies during the relevant period from the federal COPS

program as partial reimbursement for Cicero's expenditure of its own funds to hire new police officers. This COPS money was received by Cicero before the residency investigation began. Not one penny of the monies that the Petitioners received under the residency investigation contract came from the COPS program. The Cicero Grant Master testified, out of the presence of the jury, that Cicero could not obtain reimbursement monies from the COPS program until it documented that it had paid out Cicero funds for the salaries of the new police officers. Therefore, the offense conduct had *no* connection with the expenditure of federal funds and did not threaten the integrity of a federal program. Furthermore, unlike the federal programs in *Fischer* and *United States v. Edgar*, 304 F.3d 1320 (11th Cir.), *cert. denied*, 123 S. Ct. 679 (2002), the COPS program here was not a comprehensive national program that required the scrutiny of § 666 prosecutions to implement Congress's spending power. In addition, Schullo, who purportedly received the bribe, was not an elected official and did not have any authority to make spending decisions relating to a federal program.

The Seventh Circuit, in this case misinterpreting *Sabri*, held that an as-applied challenge to the constitutionality of § 666 was foreclosed by this Court's decision in *Sabri* (App. 10-11). The Seventh Circuit held that because *Sabri*, on the issue of facial constitutionality, found that the statute did not require a nexus between the bribe and the federal funds, "as-applied" challenges also must fail. In doing so, the Seventh Circuit failed to scrutinize the Petitioners' *conduct* to determine whether that conduct sufficiently threatened the integrity of federal funds or a federal program in order to fall within the limits of legitimate constitutional federal jurisdiction within our federal/state system of reserved powers, the operative factor in this Court's decisions in *Salinas* and *Fischer*. This Court should issue its writ to require careful scrutiny of

the conduct at issue to give substance to judicial determinations of the constitutionality of an 18 U.S.C. § 666 prosecution *as applied* to preserve the balance and proper relations between the national government and the states, and to notify the lower courts that an "as-applied" test of the constitutionality of a particular § 666 case is still required if a defendant mounts a challenge.

2. *The decision of the Seventh Circuit Court of Appeals in this case, holding that the opinion in Sabri v. United States, 541 U.S. 600 (2004), foreclosed an as-applied constitutional inquiry in Title 18 U.S.C. § 666 cases is in conflict with the decision of this Court in Sabri and Fischer v. United States, 529 U.S. 667 (2000), and those of other circuit courts of appeal.*

The Eleventh Circuit drew some criteria from *Fischer* for testing whether a particular prosecution under § 666 is constitutional as applied, criteria that the Seventh Circuit below ignored. *United States v. Edgar*, 304 F.3d 1320 (11th Cir. 2002) . The defendants there were executive officers at a hospital providing care for Medicare patients. They argued, unsuccessfully, that § 666 was facially constitutional. However, the Eleventh Circuit required that the government demonstrate that the federal prosecution of an otherwise local crime is necessary to protect funds expended under a comprehensive federal program or protect the integrity of the federal program. *Edgar* recognized that in *Fischer, supra*, this Court's "reference to 'the proper federal balance' demonstrates its cognizance of potential constitutional limitations upon the application of § 666." *Id.* at 1324. It found that those limits are required by virtue of the historical relationship between the states and the national government. Congress can only legislate based on one of the "enumerated powers" granted to it by the Constitution. *Edgar*, citing *McCullough v. State of Mary-*

land, 17 U.S. 316 (1819), found that the enactment of § 666 was founded on the Spending Clause, and concluded that the only prosecutions that are both "necessary *and* proper" (*Printz v. United States*, 521 U.S. 898 (1997)) to effectuate the spending power are those where federal interests are impacted by the crime, because unless federal interests are implicated, the particular prosecution is impinging on the powers of the states that have jurisdiction to prosecute local crimes under Amendment X, and is therefore one forbidden by the letter and spirit of the Constitution – the federal-state balance.

Consequently, it is a fundamental proposition that "under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." *Screws v. United States*, 325 U.S. 91, 109 (1945); *see also United States v. Bass*, 404 U.S. 336 (1971).

The constitutional limits on the scope of § 666 enunciated in *Edgar*, relying on *Fischer* and *Salinas*, were, first, that, as used in the statute, "the term 'benefits' encompasses only federal funds expended under sufficiently comprehensive programs"; "comprehensiveness" is to be determined by the program's "structure, operation, and purpose," as well as the conditions under which the recipient entity received funds. *Id.* at 1325. Second, the offense conduct had to bear a "sufficient connection to . . . the integrity of federal programs." *Id.* Clearly, the Eleventh Circuit found that the this Court's reference to the "proper federal balance" in *Fischer* demonstrated its cognizance of constitutional limitations upon application of § 666.

Edgar found that the *Fischer* approach validated the view of the pre-*Fischer* decisions in *United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999), and *United States v.*

Santopietro, 166 F.3d 88 (2d Cir. 1999), which held that the most literal interpretation of § 666 changes the existing balance of federal and state powers and renders a large class of what would ordinarily be state offenses subject to federal prosecutions. Both *Zwick* and *Santopietro* required that, for § 666 to pass constitutional muster in a given case, the offense conduct had to threaten the integrity of the federal programs.

In *Zwick*, the Third Circuit found that no federal interest was implicated where the bribe related to sewer access and use permits while the federal funds provided to a local township were reimbursements for emergency snow removal services and to prevent stream bank erosion. 199 F.3d at 688; *see also United States v. Phillips*, 219 F.3d 404, 413 (5th Cir. 2000) (§ 666 prosecution advances "no federal interest in safeguarding a particular federal program because the assessor's office has absolutely no connection with the administration of the food stamp program administered by St. Helena's parish"); *Santopietro*, 166 F.3d at 93 (offering as *reductio ad absurdum*, the federal prosecution of "a bribe paid to a city's meat inspector . . . just because the city's park department had received a federal grant of $10,000"); *United States v. Delaurentis*, 230 F.3d 659 (3d Cir. 2000) (for a conviction under § 666, the evidence must show some connection between the defendant's bribery activities and the funds supplied by the federal government or programs supported by those funds); *United States v. McCormack*, 31 F. Supp. 2d 176 (D. Mass. 1998) (court dismissed § 666 charges where $4,000 bribe to police officer to keep officer from investigating defendant's state offenses was not connected to federal funds); *United States v. Wright*, 206 F. Supp. 2d 609 (D. Del. 2002) (judgment of acquittal notwithstanding jury's verdict where acts of bribery had no effect on projects that drew from federal funds).

In *United States v. Suarez*, 263 F.3d 468 (6th Cir. 2001), the Sixth Circuit, constrained by the pre-*Fischer* decision in *United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999), stated that "[w]ere we writing on a clean slate, I, like the dissent, might well agree that proper application of 18 U.S.C. § 666 requires a minimal nexus between the alleged criminal activity and the federal funding received pursuant to that statute." *Suarez*, 263 F.3d at 489. In contrast, in light of *Fischer*, Judge Boggs, in the dissent in *Suarez*, did not feel bound by the circuit's previous decision:

> Given *Fischer*, it is no longer tenable to hold to the proposition that no connection whatsoever need exist between the federal punished criminal conduct and the federal interest in the programs supported by the funds used to satisfy § 666(b) . . . I would find *Dakota* a sufficiently "open ruling" . . . that we are no longer bound by its holding of "no nexus requirement" in light of *Fischer*.

Suarez, 263 F.3d at 486-89.

The Seventh Circuit, when presented with the precise question as to the type of circumstances in which § 666 would be constitutionally applied, and therefore not an extension of federal power beyond constitutional bounds, responded without any analysis that the prosecution here was constitutional as applied. (App. 10-11.) In so doing, that court ignored this Court's reasoning (and its own) in the case of *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *aff'd sub nom. Dixson v. United States*, 465 U.S. 482 (1984), and its earlier decision in *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981), cases expressly referred to by Congress in the legislative history of § 666. In *Dixson*, this Court determined that non-federal employees could be considered "public officials" for the purposes of 18 U.S.C. § 201, a federal bribery statute. This determination turned

on the fact that the defendants exercised considerable discretion in the administration of federal funds and the bribery related to the defendants' administration of the program. Under this analysis, the corrupt transaction in both of the foregoing cases clearly implicated federal interests.

In *Hinton*, the defendants were officials of United Neighborhoods, Inc., a non-profit corporation that had entered into a contract with the City of Peoria to administer funds that HUD awarded to Peoria. The defendants had discretion in administering the federal funds, and the federal funds paid the defendants' salaries and the entire cost of the program they administered. Significantly, the bribery related to rehabilitation contracts that fell within the purview of the programs that were paid with federal funds. *Hinton*, 683 F.2d at 196-99.

This Court affirmed *Hinton*, stating that individuals employed by private organizations that receive federal funds may be covered by § 201 if an individual possesses "some degree of official responsibility for carrying out a federal program or policy." *Dixson v. United States*, 465 U.S. 482, 499-500 (1984). The Court limited the parameters of its holding, however, by cautioning:

> By finding petitioners to be public officials within the meaning of section 201(a), we do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute . . . To be a public official under section 201(a), an individual must have some degree of responsibility for carrying out a federal program or policy . . . .

(*Id.* at 499.) This warning and limitation are telling and consistent with this Court's recent decisions regarding § 666 and its requirement that the integrity of a federal

program or funds be impacted in order for a prosecution under § 666 to be a proper exercise of federal power. Federal assistance, without more, does not warrant protection by federal prosecution.

Similarly, in *Mosley*, the defendant, an employee of the State of Illinois Bureau of Employment Security, was convicted of receiving bribes in exchange for giving preferential treatment to Comprehensive Employment and Training Programs Act ("CETA") applicants when he evaluated and referred applicants for CETA-funded jobs. 659 F.2d at 813. As in *Hinton*, the defendants were considered "public officials" because the program in *Mosley* was funded by the federal government, the defendants exercised discretion in the administration of federal funds, and the bribery related to the defendants' administration of the program. Again, unlike the facts presented in this appeal, there was a clear federal interest.

Unlike the federal programs in *Fischer* and *Edgar*, the COPS program here was not a comprehensive national program that might require the scrutiny from § 666 prosecutions in order to implement Congress's spending power. In addition, Schullo, who purportedly received the bribe, was not an elected official and did not have any authority to make spending decisions relating to a federal program.

Further, *Bass, supra,* established a standard in a Commerce Clause case that regulated activities had to have a substantial effect on interstate commerce. *Bass*, 404 U.S. at 349-51. Here, not only did the Petitioners' conduct of bribery and theft to obtain the residency investigation contract fail to have a substantial effect on the expenditure of federal funds or the integrity of the federal COPS program, it had no effect at all. In his concurring opinion in *Sabri*, Justice Thomas expressed the view that the constitutionality of § 666 should have been decided on the

Court's jurisprudence under the Constitution's Commerce Clause, art. I, § 8, cl. 3. This Court should issue its writ of *certiorari* to resolve the conflict between the Seventh Circuit's holding with this Court's decisions in *Sabri* and *Fischer*, and with decisions from the Third, Fifth, Sixth, and Eleventh Circuits.

In sum, because of the conflict between the decisions of this Court and of other circuits with the Seventh Circuit on the analysis of and the criteria for measuring the constitutionality of 18 U.S.C. § 666 as applied, and because of the recurring need to restore the balance in federal-state relations, especially in the area of local criminal law under the Tenth Amendment, this Court should grant the Petition.

CONCLUSION

For all of the reasons stated above, Petitioners pray that this Court grant its writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered below.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 03-1110, 03-1113 & 03-1195

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SPANO, SR., EMIL SCHULLO, and JAMES INENDINO,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 CR 30—Ruben Castillo, Judge.

SUBMITTED FEBRUARY 3, 2006—DECIDED MAY 9, 2006

Before CUDAHY, KANNE, and EVANS, *Circuit Judges.*

KANNE, Circuit Judge. After a trial, the defendants were convicted on various charges relating to a scheme to defraud the Town of Cicero, Illinois, and sentenced to prison. On appeal we affirmed the convictions but ordered a limited remand to ask the judge whether he would have

imposed the same sentences had he known that the Guidelines were advisory. United States v. Paladino, 401 F.3d 471, 483-84 (7th Cir. 2005). Judge Castillo answered that he would. We now affirm because we are unpersuaded by the defendants' arguments that the judge failed to exercise his discretion and because we conclude that the sentences are reasonable.

The defendants rely heavily on certain comments of the district court judge, expressed in his response to our *Paladino* remand, to argue that the judge in fact failed to exercise the discretion afforded by *United States v. Booker*, 543 U.S. 220 (2005). These comments include the judge's opinion that our precedent concerning sentencing post-Booker is "somewhat contradictory," and his opinion that we erred by sending him this *Paladino* remand.

A refusal or failure to exercise the discretion afforded by *Booker* (or our inability to determine whether discretion was actually exercised) would require a further remand. See *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). But a fair reading of Judge Castillo's response does not support that conclusion. The judge made it clear that he was reviewing the defendants' sentences again "in light of all of the § 3553(a) factors," and he explained for each individual defendant why he believed the Guidelines sentence was appropriate.

Nor is the judge's explanation insufficient. It is true that the judge focused more on the original sentencing hearing than any new (by which we mean post-remand) analysis of the § 3553(a) factors, but this is entirely understandable given the paucity of the defendants' arguments below. Neither Spano nor Schullo presented any analysis of the § 3553(a) factors and Inendino's exhortation to look at his "real conduct" was considered, albeit briefly, and rejected. On a Paladino remand a judge need not employ a full-fledged methodology for measuring the reasonableness

of the Guidelines sentence against § 3553(a). See *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). And the need for a judge to explain in detail his consideration of the § 3553(a) factors when choosing to stick with the Guidelines sentence is proportional to the arguments made by the defendants. See Cunningham, 429 F.3d at 678. When the judge is not presented with much, he need not explain much. See id. In this case, the judge's explanation was sufficient.

We still must consider for ourselves whether the sentences are reasonable. "[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness." *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). There is no challenge as to the proper calculations of the Guidelines sentences. Therefore, the defendants must rebut the presumption of reasonableness attached to the Guidelines sentences " 'by demonstrating that [their] . . . sentence[s] [are] unreasonable when measured against the factors set forth in § 3553(a).' " *United States v. Brock*, 433 F.3d 931, 938 (7th Cir. 2006) (quoting *Mykytiuk*, 415 F.3d at 608).

None of the defendants have made this showing. Neither Schullo nor Spano provide any reasons why their sentences are unreasonable when measured against the § 3553(a) factors, and we see none. Inendino, without any specific reference to § 3553(a), argues that his sentence of 78 months' imprisonment is unreasonable because he only received about $3,100 in profit from the illegal scheme, and because he allegedly thought the fraudulent contract which formed the basis of the criminal conduct was "legit." These arguments, however, ignore the jury's conclusion that he was part of a scheme to defraud the Town of Cicero, the loss amount of over $75,000, and his Criminal History Category IV. It is not unreasonable for the district court judge to determine that Inendino's conduct in this case and criminal history were serious enough to warrant a sentence within the Guidelines range. Finally, Schullo

argues that our *Paladino* procedure is unconstitutional, but he provides no reason why we should reconsider it in this case–so we will not. See *Brock*, 433 F.3d at 938.

The sentences are AFFIRMED.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 03-1110, 03-1113 & 03-1195

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SPANO, SR., EMIL SCHULLO, and JAMES INENDINO,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 01 CR 30—Ruben Castillo, Judge.

ARGUED JANUARY 20, 2004—DECIDED MARCH 24, 2005

Before 'UDAHY, KANNE, and EVANS, Circuit Judges.

KANNE, Circuit Judge. A jury found Emil Schullo, the Director of Public Safety for the Town of Cicero, Illinois, guilty of accepting a bribe valued at $5000 or more in violation of 18 U.S.C. § 666(a)(1)(B), and of the theft of at least $5000 from a federally funded program in violation of § 666(a)(1)(A). His co-defendants, Michael Spano and James Inendino, were charged and convicted of, among other offenses, paying the bribe in violation of § 666(a)(2),

and aiding and abetting the theft in violation of 18 U.S.C. § 2 and § 666(a)(1)(A). The jury also found all three men guilty of conspiring to embezzle, steal, or obtain by fraud monies owned by an organization receiving federal funds, namely, the Town of Cicero, under 18 U.S.C. § 371 and § 666(a)(1)(A).

Schullo's responsibilities as Cicero's Director of Public Safety included oversight of the town's police, fire, and health departments. The charges in this case arose out of a private investigation initiated by Schullo to determine whether three police officers lived outside of Cicero's boundaries in violation of a town ordinance. The ordinance required that town employees, including police officers and firefighters, live within the town limits. The investigation was allegedly prompted by a formal labor grievance filed by the town's firefighters, who initially discovered that the three police officers lived outside Cicero. The firefighters' grievance claimed that the residency requirement for town employees was being applied disparately and that they too should be allowed to live outside Cicero's boundaries.

Evidence at trial showed that the Town of Cicero paid $75,831.24 for the investigation commissioned by Schullo—an investigation that in reality had only $34,456.90 of "legitimate" expenses associated with it and which apparently was never used in resolving the firefighters' grievance. The remaining $41,374.34 paid by the town was divided up among the various co-conspirators, including Schullo, Spano, and Inendino.

The defendants in this consolidated appeal argue, as they did below, that § 666 is unconstitutional, either on its face or as applied to them, and thus their convictions must necessarily be vacated.

I. Analysis

At the heart of the defendants' constitutional challenges to § 666 is the contention that the statute is void for failure to require a connection between the alleged theft/bribe and the federal funds received by the town. Broadly stated, to establish a case under § 666, the government need only prove that an agent of an organization, state, local, or Indian tribal government (or any agency thereof) was offered or accepted a bribe worth $5000 or more (see § 666(a)(1)(B)) or stole that amount (see § 666(a)(1)(A)) and that the organization, government, or agency received $10,000 under a federal program in any one-year period (see § 666(b)).[1] We previously have held, without addressing the constitutionality of § 666, that a plain reading of the statute requires no nexus between the bribe and the federal funds received—in other words, the bribe need not be linked to federal funds to violate the law. *See United States v. Grossi*, 143 F.3d 348, 350 (7th Cir. 1998); *United States v. Fernandez*, 282 F.3d 500, 511 (7th Cir.), *cert. denied*, 537 U.S. 1028 (2002). With regard to their as-applied challenge, the defendants assert that we are wrong not to read a nexus requirement into § 666.

The defendants mount their facial challenge against § 666 under United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), two cases that struck down federal statutes regulating gun possession near schools and gender-motivated violence, respectively. The statutes at issue in those cases were enacted under the Commerce Clause. Critical to the

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[1] The parties here stipulated that the Town of Cicero received in excess of $10,000 from the federal COPS ("Community-Oriented Policing Services") program, a program intended to help put more police on the streets in Cicero. The defendants argue that the theft/bribe at issue here had no impact on the COPS program funding.

Supreme Court's unconstitutionality determination in those two cases was the finding that the effects on interstate commerce of the activities Congress attempted to ban were too attenuated to warrant federal oversight. See *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 615-17. The defendants claim that the same is true here: Congress, which purported to enact § 666 under the Spending Clause, did not sufficiently tie the theft/bribe to federal monies and, as a result, failed to supply the necessary justification for federal criminalization of such actions.

Alternatively, the defendants argue that Congress, in enacting § 666, improperly exceeded its enumerated powers under either or both the Spending Clause and the Necessary and Proper Clause of the Constitution. U.S. CONST. art. I.

All of the defendants' arguments were dispositively rejected by the Supreme Court in its recent decision, *Sabri v. United States*, 124 S. Ct. 1941 (2004). Sabri held § 666(a)(2) to be facially constitutional and found that no nexus between the bribe and federal funds is required.[2] *Id.* at 1945.

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[2] The Supreme Court granted certiorari in *Sabri* during the briefing of this matter. The defendants acknowledged in their reply brief that the issue to be answered in *Sabri* "expressly addresses" the matters raised here on appeal. We note that the petitioner in *Sabri* challenged only § 666(a)(2) and that the defendants challenge § 666 as a whole, having been convicted under, variously, §§ 666(a)(1)(A), (a)(1)(B), and (a)(2). However, we see no reason for any differentiation in analysis among the (a)(1) and (a)(2) charges, which are basically two sides of the same coin (agents stealing federal funds/accepting bribes versus giving bribes to agents), and defendants do not argue otherwise. Further, nothing in the Supreme Court's Sabri opinion leads us to a different conclusion. In particular we note that the Supreme Court stated it granted certiorari to resolve a circuit split "over the need to require a connection between forbidden conduct and federal funds" and then goes on to list cases from various circuits demonstrating the split. Sabri, 124 S. Ct. at 1945. Those cases all involved the application

(continued...)

In *Sabri*, the Supreme Court readily found, contrary to the defendants' position, that § 666(a)(2)'s enactment was a valid exercise of Congress's Article I powers:

> Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity. Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local and tribal recipients of federal dollars.

Id. at 1946 (internal citations omitted). The Court also found that the legislative record confirmed Congress acted appropriately within the Necessary and Proper Clause when enacting § 666. Id. at 1947 ("Congress's decision to enact § 666 only after other legislation had failed to protect

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[2] (...continued)
of § 666(a)(1)(B)—agents demanding or accepting bribes—not § 666(a)(2), the provision under which petitioner Sabri was indicted. See, e.g., *Grossi*, 143 F.3d at 348 (stating that Grossi "demanded and received bribes," a § 666(a)(1)(B) offense); *United States v. Lipscomb*, 299 F.3d 303, 308 (5th Cir. 2002) (defendant convicted under § 666(a)(1)(B)); *United States v. Zwick*, 199 F.3d 672, 675 (3d Cir. 1999) (same); *United States v. Santopietro*, 166 F.3d 88, 91 (2d Cir. 1999) (same), all cited in Sabri, 124 S. Ct. at 1945. We therefore conclude that the Supreme Court did not intend to limit its holding to § 666(a)(2), would find § 666(a)(1) constitutional on the same grounds, and would similarly find no nexus requirement for § 666(a)(1) offenses.

federal interests is further indication that it was acting within the ambit of the Necessary and Proper Clause.").

The Supreme Court also specifically rejected petitioner Sabri's reliance on the Lopez/Morrison line of cases, which defendants here echo. The Court noted that the statutes at issue in Lopez and Morrison failed because of their clear lack of a direct connection to commerce or any sort of economic enterprise and because the nexus articulated by Congress—preservation of social prosperity and productivity—expanded Commerce Clause authority beyond limit. *Sabri*, 124 S. Ct. at 1947. The Court distinguished § 666(a)(2) from the Lopez and Morrison statutes by finding a direct link between § 666(a)(2) and congressional spending power:

> No piling [of inferences] is needed here to show that Congress was within its prerogative to protect spending objects from the menace of local administrators on the take. The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first pace, and Sabri would be hard pressed to claim, in the words of the Lopez Court, that § 666(a)(2) "has nothing to do with" the congressional spending power.

Id.

Finally, although *Sabri* involved a facial constitutional challenge only, the opinion also forecloses the defendants' as-applied challenge. The defendants argue that to be convicted under § 666, the government had to prove a connection between the theft/bribe and the COPS program funding received by the town. In granting certiorari, the Court specifically noted our position, outlined in Grossi, that no nexus is required between the forbidden conduct and the federal monies to support a conviction under § 666. *Sabri*, 124 S. Ct. at 1945. The Court subsequently ap-

proved our reasoning in *Grossi* that no direct connection is necessary, because any misuse of funds covered by the statute ultimately affects the monies provided by the federal government:

> It is true . . . that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers.

Id. at 1946 (citations omitted); *cf. Grossi*, 143 F.2d at 350 ("Yet money is fungible and its effect transcends program boundaries. The general assistance program has more to spend on welfare (or dangle as a lure for bribes) if the federal government meets some of the Township's other expenses."). Therefore, the district court was correct in finding that a nexus between the theft/bribe and the federal funds received by the Town of Cicero was not an element of the crimes with which the defendants were charged.

Based on the Supreme Court's *Sabri* opinion, we find 18 U.S.C. § 666 constitutional on its face and as applied to the defendants. Because the other issues raised by the defendants hinge on a finding that § 666 is unconstitutional, we need not address them.

One final matter we must address, however, is the effect of the recent Court decision in *United States v. Booker*, 125 S. Ct. 738 (2005), on the defendants' sentences. In *Booker*, the Court reaffirmed the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and extended its principles to the federal Sentencing Guidelines, holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Booker, 125 S. Ct. at 756. In its remedial holding, the Court excised the mandatory provisions of the Guidelines. *See id.* at 757. As a result, district courts now have the discretion to sentence outside the ranges set in the Guidelines, and we review these sentences for reasonableness. See *id.* at 765-66.

The defendants failed to raise in the district court an Apprendi-based objection to their sentences. Accordingly, we review for plain error. "Under [the plain error] test, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." United States v. Cotton, 535 U.S. 625, 631 (2002) (citation and internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

The record discloses that all three defendants received sentences mandated by the Guidelines and increased on the basis of facts found by the judge, not the jury—in other words, their sentences were imposed under a sentencing scheme that we now know is unconstitutional. Their sentences, therefore, were imposed in error, and the error is plain. See *United States v. Paladino*, No. 03-2296, 2005

WL 435430, at *7 (7th Cir. Feb. 25, 2005). We cannot determine, however, whether the defendants would have received the same sentences had the district court been free to exercise the broad sentencing discretion now afforded in the wake of Booker. In short, we are unable to resolve whether the defendants' substantial rights were affected when they received sentences imposed under the mandatory Guidelines system.

As we concluded in *Paladino*, the "only practical way . . . to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge." *Paladino*, 2005 WL 435430, at *10. To that end, we "order a limited remand to permit the sentencing judge to determine whether he would . . . reimpose his original sentence." *Id.* If the district court determines that the defendants would have received the same sentences, we will conclude that the defendants were not prejudiced and the plain error challenge must fail. We will then affirm the original sentences, provided they are reasonable. *See id.* (citing *Booker*, 125 S. Ct. at 765).

On the other hand, if the district court decides that different sentences would have been appropriate in the exercise of greater discretion, "we will vacate the original sentence and remand for resentencing." *Paladino*, 2005 WL 435430, at *10. Regardless of whether the district court decides to resentence the defendants, the court should abide by the process we set forth in Paladino to provide an appropriate explanation for its decision. *See id.*

II. Conclusion

For the foregoing reasons, we AFFIRM the defendants' convictions. As to the defendants' sentences, however, we order a limited remand of this case in accordance with the remedial procedure adopted by this circuit in *Paladino*.

The district court is directed to return this case to us at the completion of its sentencing determination, pursuant to the procedure set forth in *Paladino*.